IN THE

Supreme Court of the United States

October 1956 Term

No. 2621

GEORGE P. GAVINETT,

Petitioner,

v.

ASTRA STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY D. GRAHAM,
Counsel for Petitioner,
76 Beaver Street,
New York 5, N. Y.

CHAS. A. ELLIS,
of Counsel.

INDEX

	PAGE
Opinion of the Court Below	1, 8
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Allowance of the Writ	5
Conclusion	7

Table of Cases Cited

Ferguson v. Moore-McCormack Lines (C. of A. 2d), 228 F. 2d 891; reversing, 352 U. S. 521 (1957)	5, 6
Germanic, The (1905), 196 U. S. 589, 596	7
Rogers v. Missouri R. R. Co. (1957), 352 U. S. 500	6

Statute Cited

The Jones Act, 46 U. S. C. A. 688	3

IN THE

Supreme Court of the United States

October 1956 Term

No.

GEORGE P. GWINETT,

Petitioner,

v.

ASTRA STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, an American-merchant seaman and plaintiff-appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled matter.

The Opinions of the Courts Below

There was no opinion by the trial court, United States District Court for the Southern District of New York (Dawson, D.J.), sitting at law, upon the motion to set aside the verdict and grant a new trial. The District Court's charge to the jury is at "A" 6a-27a.

"A"—Refers to Petitioner's Appendix below

The opinion of the United States Court of Appeals for the Second Circuit (Hincks, Stewart and Lumbard, C.J.J., opinion per curiam), is reported in 243 F. 2d 8 and is printed here at page 9.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on April 12, 1957.

This cause is brought under the Jones Act (46 U. S. C. A. 688) and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U. S. C. A. Secs. 1254(1), 2101(c) and 2106.

Questions Presented

1. Where a seaman, under orders of a superior to complete the overhauling of a generator, requested that an assistant be assigned to help him lift and replace its cylinder head, but the superior refused him an assistant and directed him to do it alone, and he sustained serious injuries in lifting the cylinder head alone, and there was evidence, which a request by the jury for instructions indicated the jury believed, that he was refused a helper because the Fourth of July holiday would call for overtime pay, did the question of the superior's negligence depend on whether he "directed plaintiff to do a job which a reasonable man would consider as *dangerous* to the plaintiff" and "would say was *dangerous*, if it was done without assistance" and "would conclude that it was a *dangerous* thing to order or permit" and "which reasonably would be *expected* to cause injury to the plaintiff"?

2. Was it prejudicial error under the circumstances for the Court to *refuse* to charge that (1) the failure to supply

sufficient help for the safe performance of a task assigned to a seaman which results in injury to that seaman constitutes negligence under the Jones Act for which the employer is liable, and (2) that if the jury find that the plaintiff, in replacing the cylinder head of the generator, was doing the work of more than one man and that this effort proximately resulted in his injury of July 4, 1951, they must return a verdict for plaintiff upon the first cause of action?

3. Where a seaman's request for an assistant to help him perform a designated task is denied by his superior, and the seaman sustains serious injuries in endeavoring to perform the task alone, is it a necessary ingredient of negligence under the Jones Act; 46 U. S. Code 688, that the seaman must prove that his superior "was able to reasonably foresee" that harm would befall the seaman by requiring him to perform the task unassisted?

Statutes Involved

"*46 U. S. Code 688. Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *." (Balance not pertinent here.)

Statement of the Case

Plaintiff, a seaman, third assistant engineer on defendant's SS HAROLD T. ANDREWS, sued under the Jones Act for personal injuries consisting of two ruptured discs sustained on July 4, 1951, while attempting under orders

of the chief engineer to replace a heavy steel cylinder head on a generator which he had been required to overhaul.

Upon disassembly, plaintiff had been provided with an assistant to help him remove the cylinder head.

Plaintiff requested that a wiper be assigned to assist him in replacing the cylinder head. This request was refused by the chief engineer, who ordered him to do it alone. Plaintiff's evidence established that such refusal was because work of a helper on the Fourth of July holiday would call for overtime pay. That the jury accepted this as the reason for the refusal is apparent from the following written inquiry submitted to the Court by the jury after considerable deliberation:

> "Your Honor.
>
> Does the fact that it has been stated that the 3rd engineer's job is a *one* man's job give the chief mate the right to refuse the 3rd engineer assistance when plaintiff requested a helper (because of the July 4th holiday calling for overtime pay)" (A. 25a).

The Court did not give the jury a responsive answer to this inquiry. It previously had charged, and now repeated by supplemental charge, instructions that

> "Now, a shipowner through its officers has a duty to a seaman, *or any other man on the ship*, to exercise reasonable care as to any *dangers* that might be apprehended.
>
> * * *
>
> Now, if the defendant, through the chief engineer, directed plaintiff to do a job which a reasonable man *would consider dangerous* to the plaintiff, then of course the defendant will be guilty of negligence.
>
> If, on the other hand, the defendant, through the chief engineer, directed the plaintiff to do a job which was a customary job, which was not the type of thing which reasonably *would be expected to cause injury to the plaintiff*, then the mere fact that an injury did occur is no proof that the injury was caused by the negligence of the defendant.
>
> * * *

Was it negligence in the sense that a reasonably man would say, *That is a dangerous thing that I have told that man to do*" (A. 26a; cf. 10a-11a).

The Court, at defendant's request, charged:

> "The defendant would have no duty to warn plaintiff of an obvious and apparent danger. In other words, they had a right to assume that the man would act as a reasonably prudent man himself—that is obviously true" (A. 20a).

The Court refused (A. 21a) plaintiff's requests to charge:

> "11. The failure to supply sufficient help for the safe performance of a task assigned to a seaman which results in injury to that seaman constitutes negligence under the Jones Act for which the employer is liable.
>
> "13. If the jury find that the plaintiff, in replacing the cylinder head of the generator, was doing the work of more than one man and that this effort proximately resulted in his injury of July 4, 1951, they must return a verdict for plaintiff upon the first cause of action" (A. 29a).

The jury having finally rendered a verdict for defendant, plaintiff appealed. The Court of Appeals affirmed, saying in a *per curiam* opinion:

> "As to this cause of action, we find no error in the charge or in the refusal to charge as requested: The *foreseeability of harm* is still a pertinent test in negligence cases under the Jones Act. *Ferguson v. Moore-McCormack Lines*, 2 Cir., 228 F. 2d 891. In reversing this decision, 352 U. S. 521, the Supreme Court did not reject the pertinence of that test" * * *."

Reasons for Allowance of the Writ

The decision herein is in direct conflict with decisions of this Court and the liberal, protective intent of the Congress for seamen as contained in the Jones Act and the statutes adopted thereby.

The decision herein allows a District Court by its charge, and refusals to charge, to deprive an injured seaman suing under the Jones Act of the right to a determination by the jury of an issue of negligence. The fact that this is done by means of a formulated definition of negligence and reasonable foreseeability does not lessen the limitation imposed on the plaintiff to a right to recover only for intended or wilful wrongs rather than negligence.

In *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, (1957), this Court recently considered and reversed the "reasonable foreseeability" opinion of the Court below, whereby it had set aside a jury verdict and said:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream."

Here, defendant's chief engineer *knew* and, indeed, *ordered* that plaintiff would lift the cylinder head without the assistance of a helper whom plaintiff had told him he needed.

In *Rogers* v. *Missouri P. R. Co.*, 1957, 352 U. S. 500, this Court said that "this Court is vigilant to exercise its power of review in any case where it appears the litigants have been deprived of that determination" and that "Special and important reasons for the grant of certiorari in these cases is certainly present when lower federal and state courts persistently deprive litigants of this right to a jury determination."

It is to be remembered that this man was a seaman, obliged by law to obey the orders of his superior. He was in no position, as would be a shore employee, to refuse to obey and quit his employment. The most he could do was

protests as he did; and then obey, as he did. The Court, however, instead of submitting the case to the jury with this spirit reflected in his charge, actually limited plaintiff more narrowly than claimants at common law unrelated by employment could properly be limited.

Fifty years ago, Mr. Justice Holmes said in *The Germanic* (1950), 196 U. S. 589, 596:

> "But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent."

If one were liable only when a reasonable man would say, with conscious realization, "That is a dangerous thing that I have told that man to do" (A. 26a), a seaman would be limited to recovery only for realized wrongs—rather than negligence.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted.

HARRY D. GRAHAM,
Attorney for Petitioner,
76 Beaver Street,
New York 5, N. Y.

CHARLES A. ELLIS,
of Counsel.

July 9, 1957.

APPENDIX

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 273—October Term, 1956

(Argued March 15, 1957 Decided April 12, 1957.)

Docket No. 24118

GEORGE P. GWINETT,

Plaintiff-Appellant,

v.

ALBATROSS S.S. CO., INC.,

Defendant,

and

ASTRA STEAMSHIP CORPORATION,

Defendant-Appellee.

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Dawson, *J.*, based on a jury verdict for the defendant Astra Steamship Corporation in an action brought under the Jones Act, 46 U. S. C. A. § 688, and the general maritime law, claiming damages resulting from personal injuries and the aggravation thereof. As against the defendant Albatross S.S. Co., Inc., the complaint had been dismissed below by consent. *Affirmed.*

HARRY D. GRAHAM, New York, N. Y., *for plaintiff-appellant.*

J. WARD O'NEILL, of Haight, Gardner, Poor & Havens, New York, N. Y. (William P. Kain, Jr., on the brief), *for defendant-appellee, Astro Steamship Corporation.*

PER CURIAM:

The plaintiff was instructed to repair a generator without assistance from others. In so doing he injured himself by lifting a part of the machine which on a prior occasion he had handled without injury. The first cause of action was based on negligence in causing this injury.

The appellant contends that it was erroneous to charge the jury that under the Jones Act negligence should be based on the foreseeability of harm and that it should measure conduct by what a reasonable man would do. Instead, appellant contends, the jury should have been instructed that the work order given by a superior officer to the plaintiff was negligent if it resulted in his injury: he complains of the judge's refusal to charge to that effect.

As to this cause of action, we find no error in the charge or in the refusal to charge as requested. The foreseeability of harm is still a pertinent test in negligence cases under the Jones Act. *Ferguson* v. *Moore-McCormack Lines*, 2 Cir., 228 F. 2d 891. In reversing this decision, 352 U. S. 521, the Supreme Court did not reject the pertinence of that test nor did it overrule its prior decisions in *Buzynski* v. *Luckenbach S.S. Co.*, 277 U. S. 226; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Cartes* v. *Baltimore Insular Line*, 287 U. S. 367; and *De Zon* v. *American President Line*, 318 U. S. 660, 671. Our decision in the *Ferguson* case was reversed because it was thought that on the evidence the issue of negligence had properly been left to the jury. Here, the issue was properly submitted to the jury and resulted in a verdict adverse to the plaintiff.

The second cause of action, based on a claim that the defendant negligently caused an aggravation of the plaintiff's injury, was also properly submitted to the jury which

decided, adversely to the plaintiff, all the crucial facts involved. And in view of the abundance of evidence to support the verdict on both counts of negligence, the judge was plainly right in denying the motion to set aside the verdict and for a new trial.

Since the case was properly submitted on the merits, there is no need to consider the effect of the plaintiff's failure to except to the charge as given until after an unfavorable result had been announced. Cf. *Palmer* v. *Hoffman*, 318 U. S. 109; *Tompkins* v. *Chicago, D. & G. Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 259. And certainly the judgment should not be disturbed because the record fails to show that the court did "inform counsel of its proposed action upon the requests prior to their argument to the jury," as directed by F. R. C. P. 51. This is especially so since, so far as the record shows, the plaintiff proceeded with his argument without requesting such information of the court. Cf. *Lerin* v. *Joseph E. Seagram & Sons*, 7 Cir., 158 F. 2d 55, cert. den. 330 U. S. 835. Moreover, there is no showing of any resulting prejudice on this account.

Affirmed.